

Feb. 26, 1752.

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Walker
[Lord Colston Reporter.]
House
INFORMATION

Colston
FOR

Alexander Thomson of Banchoy, Andrew Thomson of Crawtown, and James Thomson of Portlethen, Justices of the Peace, and Commissioners of Supply for the County of Kincardine, Defenders,

AGAINST

Alexander Walker, Tenant in Acquhirrie, and Peter Herd, some time his Servant, Pursuers.

THE laudable Spirit that has of late Years prevailed among the Gentlemen of *Aberdeen-shire*, and neighbouring Counties, for repairing the publick Roads, is well known to your Lordships, and indeed to the whole Country. The Law having intrusted the Management of that most necessary Branch of Police, to the Justices of the Peace, and Commissioners of Supply, these Gentlemen have been at infinite Pains and considerable Expence, in carrying on the Work, without any Prospect of Fee or Reward to themselves. But as the best approved Scheme is oft opposed in the Execution, from various Motives, so in most Counties there have appeared some factious Persons, who have exerted themselves to frustrate the Measures taken for Improvement of the Roads.

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In the Year 1754, the Justices and Commissioners of the County of *Kincardine*, resolved to begin the Repairs of the Post-road, at the North Water, and carry it Northward thro' their Bounds. For that Purpose, they ordered the People of the Shire to come in, and perform at that Place, the Statute-work, or otherways to pay the legal Composition: Neither of these Alternatives were obeyed by *Alexander Walker* in *Acquibirrie*, one of the present Pursuers, who formed and headed a Secession among the Country People, and brought a Suspension of the Order into this Court. He insisted, that it was a great Hardship to force the People to come from one Corner of the County to another, or else pay the legal Penalty, when the Commissioners had the Power of dispensing with their Labour, for much less than that Penalty. Your Lordships, however, most judiciously put a Stop to the Opposition for that Year, by repelling the Reasons of Suspension.

The following Year, 1755, the Justices and Commissioners resolved to try another Method, for accommodating the Country People, by dividing the County into Districts, and allotting the Work for the Inhabitants of each District, to the Roads within it, and none else; so that they should have but a few Miles to travel from their own Houses, to the most distant Parts of those Roads. In this Scheme, one District, consisting of the Parishes of *Dunnottar*, *Fetteresso*, *Maryculter*, *Nether Bauchory*, and *Nig*, were appointed to repair the Post-road from *Stonehaven* to the Bridge of *Dee*, the present Defenders, and several other Gentlemen, were appointed a Committee, for the Management of this Road, " With Power " to require the Statute-work of their Bounds, or if they " should think proper to accept of a Composition, of 6 s. " Scots for each Man, and 12 s. Scots for each Horse, agree- " able to the 9th Act of the Parliament 1670, and to apply " the same for Repair of the Roads under their Direction."

In the Year following, being 1756, the Prosecution of the above Scheme was continued, with this Variation, that the

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Composition was reduced from a Sixpence, to a Groat a-Day, for each Man, for the whole six Days he was liable in the Statute-work, the Composition for Horses continuing as formerly. The Committee of the *Stonehaven* District, by publick Advertisements, intimated to the People in general, that they should pay their Composition, and thereupon have their Labour dispensed with. Mr. *Walker*, however, and others influenced by him, would not comply, which obliged the Committee to publish other Advertisements, calling out the Deficients to work, and still offering to dispense with them, on Payment of their Composition-money. Mr. *Walker* still scorned the taking the Benefit of this Concession, but to shun legal Distress, sent three of his Servants, with Horses and Carts, to the Place appointed, which was not above three Miles from his House, where they made a Shew of working for the appointed Time, but in such a superficial Way, that it is informed, their whole three Days Labour was not worth three Shillings. And, as if Mr. *Walker* had repented of complying so far, he, and a Number of his Followers, neither performed the Work, nor paid the Composition for the three Days, after Harvest 1756.

It is here proper to inform your Lordships, that the Statute-work of the Tenants, and their Servants, in this County, had never turned to any good Account, as they were neither furnished with proper Tools, nor skilled in the Method of executing the Repairs. The Road, in particular, from *Stonehaven* to *Aberdeen*, was so rocky and hard, that they could make nothing of it. It was therefore thought more expedient and advantageous, both to the People themselves, and the publick Work, that a small Composition should be levied, and applied to the Purchase of Tools, and the Hire of a Party of Soldiers, and other proper Workmen, skilful in the Methods of making and repairing Roads. The Design was thought so deserving of publick Encouragement, that his Excellency Lord *George Beauclerk*, gave Orders for the furnishing of Powder from the King's Magazines, for blowing the Rocks. The whole

whole was performed under the Eye of the Defenders in this Process, who took the Trouble of coming out from *Aberdeen*, on their own Charges, at least once a Week, to inspect the Work, and encourage the Workmen, by giving them Drink-money. Thus a Road, which was formerly extremely bad, has been made as good as any Turnpike Road in the Kingdom, as several of your Lordships must have had an Opportunity to observe, and that without the Imposition of any Toll or Tax whatsoever.

On these Considerations, the General Meeting, held on the 17th May 1757, continued the same Division of the County into Districts, but made a farther Reduction of the Composition Money, from a Groat a-Day, to one Shilling *Sterling* for the annual Labour of a Man, providing the same was paid against the 15th of *June*, otherways the whole six Days Labour was appointed to be exacted. In respect of the Number of the Deficients, for the Year preceeding, in the Parishes of *Fetteresso* and *Dunnottar*, it was also agreed, that Sixpence should be levied from these Deficients, besides the Shilling above mentioned, for the Year 1757, and that their Horses and Carts should be liable for the Half of the legal Composition, over and above that for the current Year.

Agreeable to this last mentioned Resolution of the General Meeting, the Committee on this Road, from *Stonehaven* to the Bridge of *Dee*, caused Notice be given in the Church of *Dunnottar*, on the 29th of May 1757, that those liable in Statute-work, should pay in to *Robert Burns*, their Clerk, before the 15th of *June*, the Composition of one Shilling *Sterling*, for each Man's Labour that Year, and Sixpence more for such as had been deficient the Year preceeding, " With Certification, that if they failed, their Statute-service for six Days that Year, would be exacted to the utmost, and the Deficients in the Harvest preceeding pointed." The Certificate of this Intimation is produced, with an Attestation by Mr. *Burns*, " That *Alexander Walker*, the Pursuer, neither
" paid,

“ paid, for himself nor his Servants, the Road-composition as required by that Advertisement.”

A wilful Refusal, to pay so easy a Composition, it is apprehended, might have been just Ground of a Warrant for poinding to the Extent of the legal Penalty, without any new Intimation. However, Mr. *Burns*, the Collector, of-new caused make Notification in the Church of *Dunnotter*, on *Sunday* the 14th of *August* 1757, that the Deficients should come out and work on the High-way, between *Stonehaven* and *Hildontree*, upon the 15th, 16th, and 17th Days of that Month, as their three Days work before Harvest, or else to pay in to him their respective Compositions.

Upon these repeated Notifications, Numbers of People in the District paid the small Composition required, as much easier than the Performance of the Work ; but still a good many, and particularly the present Pursuers, neither wrought nor paid. Mr. *Burns* therefore, drew up a List of the Deficients, and subjoined thereto a Certificate, and Application to the Justices and Commissioners, for a Warrant to poind them. This List and Application he laid before the Defenders, as being three of the Justices and Commissioners, who thereupon “ Granted Warrant for poinding the Deficients in the Parish “ of *Dunnotter*, as particularly named and designed on the two “ preceeding Pages, to the Extent of Eighteen Pence *Sterling*, “ for each of the three Days Absence from the Statute-work, “ preceeding Harvest 1757.” At the same time, the Defenders gave Orders, that on Payment of the above mentioned Composition of one Shilling for the whole Year’s Statute-work, the Poinding should be stopt, and accordingly the Execution against the Pursuer, *Peter Herd*, bears, “ That after requiring “ him to pay one Shilling *Sterling* of Composition-money, the “ Constable proceeded to poind.”

The Warrant for poinding, was granted on the 13th *September*, and Notice of it was given to all the Deficients, before any Execution was ordered. The Effect of this was,

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that all who were able, paid the Composition, except the two present Pursuers, Mr. *Walker*, and his old Servant *Herd*. Mr. *Walker*, instead of complying, wrote threatening Letters to two of the Defenders, and likewise to sundry other Gentlemen, alledging falsely, that he had never been called out to work upon the High-roads, for a Twelvemonth preceeding, but in Seed-time and Harvest, when he was not obliged to work, and further, that the Place appointed for working, being the *Burn of Feppie*, was no less than seven computed Miles from his House, and therefore the Law could not oblige him at any time to go so far to work upon the Roads, adding, what is a sufficient Proof of his Intention to harass the Commissioners with a Law-suit, " That, in my humble Opinion, if " any Warrant of Poinding is execute against me at this time, " I will have very just Ground to complain of it." A Copy of these circular Letters, Mr. *Walker* took Care to keep, and has produced in Process.

It thus appearing, that Mr. *Walker* was resolved to contemn and disobey all Orders relative to the Roads, in whatever Shape they were given. Mr. *Burns* therefore, after waiting till the 14th of *November*, caused a Constable put the Warrant in Execution, by poinding from Mr. *Walker*, for the Penalty, a Copper Kettle, with two Lugs, an old Pewter Plate, and an old Pewter Trencher, in respect of the Deficiency of himself and his three Servants. This Poinding, Mr. *Walker*, with his usual Spirit, suffered to proceed, rather than pay the trifling Composition required, and at the same time took a Sort of Protest, which he entered on the Back of the Copy of his aforesaid Letter produced; and through his Influence, the other Pursuer, *Peter Herd*, also stood out, and on the 17th of *December* following, the Constable, on his refusing to pay the Composition, poinded from him a little Kettle-pot, valued at fourteen Shilling Scots.

Mr. *Walker* soon after, began to prosecute his original Intention, of going to Law with the Justices and Commissioners. Accordingly,

Accordingly, he raised this Process of Spulzie, Oppression, and Damages, not against the Overseer, Mr. *Burns*, who applied for, and caused execute the Warrant, but against the three Gentlemen, who signed the same, and the Constable who executed it.

This Process came in Course, before the Lord *Colston* Ordinary, on the 14th of *July* last, when his Lordship was pleased to pronounce the following Interlocutor: " Having considered the above Debate, finds, that the Act of Parliament 5to. *Geo. I.* does so far repeal the former Acts, as to limit the Time for calling out People, liable to work, before Harvest, that it should be before the End of *June*, and as the Pursuers, in this Case, were warned to work at the High-ways in *August*, finds the Warrant granted for pointing their Effects, for not Compliance, and the Pointing thereupon, was irregular, and therefore, finds the Defenders liable to the Pursuers, in Restitution of the Goods libelled, but not in any penal Consequences, Damages, or Expences, as to which last, assails them and decerns."

Against this Interlocutor, mutual Representations and Answers were presented, upon advising which, the Lord Ordinary, on the 19th of *December* last, took the whole Cause to report, and appointed Parties to give in Informations.

In this Information, upon the Part of the Defenders, they shall endeavour to shew, 1mo. That the Pointing complained of, was occasioned by the inexcusable Obstinacy of the Pursuer, Mr. *Walker*, and became necessary for enabling the Justices and Commissioners, to carry on with Success, the Repairs of the publick Roads. 2do. That the Pointing was legal and regular. And, lastly, That supposing it had not been so, yet the Defenders, who granted the Warrant, cannot be liable in Damages to the Pursuers.

And with respect to the first Point, the Defenders humbly apprehend, they need say very little, after giving the preceding Detail of the Case. Every Step of Mr. *Walker's* Conduct, has

has manifested the most unjustifiable Intention of opposing every Scheme that could be suggested by the Justices or Commissioners, for repairing the High-ways of the County. In Prosecution of this Intention, he has exerted himself on every Occasion, with unwearied Diligence. He is reputed the most substantial Farmer in the Country, and as such, is a leading Man among the Commons. Sensible of his Influence, he has not only set the People an Example of wilful Disobedience in himself, but has for several Years past, used all the Force of personal Solicitation, to prevail on his Neighbours to join in the Opposition. Your Lordships have been put in Remembrance of the Suspension which he brought in this Court, when the Plan of the Commissioners was to exact the Statute-work specifically, from all those liable in it. Since that Plan was changed, and a Composition, far below that authorized by Law, required from the People, he has changed his Ground, and as keenly opposed the levying that Composition, as he did formerly the Exaction of the Statute-work. In fine, he has acted the Part of a seditious Tribune, and however much that Character may be extolled in ancient Story, it is believed your Lordships will not think it for the Advantage of a well-ordered Government, such as this is, that Matters of the greatest publick Utility should be confounded, and Schemes to promote that Utility, rendered abortive, by a turbulent Spirit of groundless Opposition.

And whatever Check Mr. *Walker's* Conduct might have merited, your Lordships see, that no rigorous Measures were pursued against him, till it appeared that the mildest Methods were ineffectual to reclaim him. Not to go farther back than the 1756, his total Deficiency after Harvest that Year, both as to the performing the Work, and the paying the Composition required, exposed him to the same Execution which he now complains of; no such Step, however, was then taken against him, and all that was asked on that Account, was a Trifle of a Sixpence for himself and his Servants. The repeated

peated Notifications made to him, either to pay, or to work between the 29th of *May* and the 13th of *September*, when the Warrant was issued, have been already mentioned, and sufficiently shew, that he and the other Deficients were treated with remarkable Indulgence. His own Letter proves, that the Warrant was intimated to him in a few Days after its Date, but notwithstanding his thereby positively declaring his Resolution not to pay the Composition, which the Defenders had still ordered their Collector to accept of, the Warrant was not put in Execution till the 14th of *November*, and even then, the Poinding would have been stopt, had he thought fit to pay the Trifle required of him. These Facts shew, that no violent Measures were pursued against this Gentleman, but that, on the contrary, he was treated with a Lenity and Tenderness, which his Conduct did by no Means entitle him to.

Nor was the Poinding at length executed, without the most urgent Necessity. It was not the Extent of the Penalty, or Value of the Poind, that could be of any Consideration, but the Consequences of Mr. *Walker's* trampling on the Authority of the Justices and Commissioners, at pleasure. His Opposition became a Matter of general Concern to all the Commons in the County, who openly declared, that if he got free, not one of them would submit to any Orders that might be issued by the Commissioners.

And to shew, that it was not on the Footing of Informalities in Procedure, that he resolved to stand out, it is material to observe, that although called out to work in *June* last, 1758, in the most regular Manner, yet he would neither come out upon the Road, nor send his Servants, nor pay the Composition, until a Warrant of Poinding was issued against him, and then he thought proper to pay, but under Protest, that his so doing should not hurt his Plea before this Court. This abundantly testifies the Spirit of this Gentleman, and his determined Resolution to contemn and oppose all the Regulations of the County Meetings. No sooner too, was the Lord Ordinary's

nary's first Interlocutor pronounced in this Cause, than the News of it was spread through the County, as of a great Victory obtained by Mr. *Walker*, over the Justices and Commissioners. These Circumstances, it is hoped, will satisfy your Lordships, that the Execution complained of, was expedient and necessary, and at the same time conducted with all possible Tenderness and Indulgence to the Pursuer.

And, with respect to the 2^d Point, namely, how far the Poinding was legal or regular. The Objection urged by the Pursuer, is founded on the Act of the 5th of the late King, which, he contends, repealed the former *Scots Acts*, relative to the calling out those liable in Statute-work, and limited the Time for so doing, to be before the End of *June*. From thence he concludes, that he could not be regularly called out in the Middle of *August*, and consequently, that the Poinding for his not complying, was illegal.

Here your Lordships need not be informed, that by the Laws of *Scotland*, relative to the Repairs of High-ways before the 1670, the Justices of the Peace were authorized to call out the People to work on the Roads at certain stated Times. This Limitation, in Point of Time, was soon found inconvenient, on account of the accidental Variation of Seasons; and therefore, by the Act 1670, proceeding on a Recital of that Inconveniency, "The Justices were empowered to call out the People upon the Roads, any Time or Season that should be judged most convenient, *Seed-time and Harvest being excepted.*" This Act, the Defenders apprehend, does not stand repealed by the Clause of the Statute 5^{to}. *Geo. I.* enacting, "That the Justices, &c. shall convene the Tenants, Cottars, and other labouring Men, within their respective Bounds, as aforesaid, to work three Days before the last Day of *June*, in the Year of our Lord 1719, not being in Seed-time; and likewise, to work three Days after Harvest, and so yearly, and every Year, until the said High-ways, &c. are sufficiently repaired."

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This Clause of the *British* Statute, it is apprehended, falls to be constructed in Consistency with the preceeding Part of the same Statute, which expressly provides, "That all the Laws then in Force in *Scotland*, concerning the repairing Highways, Bridges, or Ferries, not thereby altered or repealed, should be duly put in Execution." The Legislature certainly did not intend, that any Part of the *Scots* Acts should suffer a Repeal by Implication, or too nice Interpretation of that Statute. The Direction of the *British* Statute therefore, relative to the calling out the People to work, ought to be understood as specially applicable to the Year 1719, as it does not in express Words direct, that in all succeeding Years they should *only* be called out before the End of *June*, or discharge the calling them out after the Close of that Month. It is certain, that in many Places of this very County, especially since the Change of the Stile, the Bear Seed is scarce over before the End of *June*; and the same is the Case in many other Counties in *Scotland*. Besides, as soon as the Bear Seed is over, the People fall to the casting their Peats, and then to the cutting their Hay, which commonly employ them to the End of *July*, so that the Beginning of *August*, before the Harvest comes on, is as convenient a Time for calling out the Country People, as any in the Year. As therefore, in explaining this Statute, Regard must be had to the Ends and Purposes of it, it is evident, that, consistent with these, this Clause cannot be made to operate a Repeal of the Regulation 1670.

But farther, as it will be allowed, that long and universal Custom, in Opposition to a Statute, will annul it, *a fortiori* must it serve to explain the Meaning of a doubtful Law. It is notorious, that through most, if not all Parts of *Scotland*, the Justices and Commissioners have considered the Act 1670, as in full Force, notwithstanding the Statute of the late King, and have accordingly adhered thereto, by calling out the People at such Times as were found most convenient for

for them, either before or after the End of *June*, *Seed-time* and *Harvest* only excepted. Nor is it any Bar to the Defenders Argument, that the *British* Statute is confessedly in full Force in other Respects. The Defenders do not maintain, that any contrary Custom, that could have prevailed since that Statute was made, would have been sufficient to abrogate it by Desuetude, or that your Lordships can, from Motives of Expediency, by Judgment, repeal an Act of Parliament. They only contend, that the Words of the Statute do not clearly fix the Point, and therefore, that the Sense of the Country, and your Lordships Decisions, may give it that Explanation, which is most conducive to publick Utility. Certain it is, that if the Time of calling out the People to the Roads, for the Spring Season, is found limited to the End of *June*, the good Purposes of the Law will be in a great Measure defeated, as the Summer's Work is that upon which the chief Dependence can be had.

Again, even supposing the Regulation of the Act 1670, as to the Time of calling out the People to work, to be repealed by the *British* Statute, yet the Defenders apprehend, the Poinding complained of, was regular, on a separate Footing. It is agreed, that another Branch of the Act 1670, empowering the Justices to dispense with the Attendance and Work of Persons living at a Distance, and to levy a certain Composition from them, stands unrepealed. This Power is understood to have been granted, not only in favour of the Persons liable in Statute-work, but also for the Advancement of the intended Purposes of the Law. The Option, therefore, is in the Justices and Commissioners, who may either oblige the People to perform the Work, or to pay the Composition, as they may find it most conducive for the Advancement of the Branch of Police committed to their Care.

In this County, it was found impossible for the poor People, unprovided with Tools, and unskilful in performing the Work, to execute the necessary Repairs. On the other hand, the

the great Scarcity that prevailed in the Years 1756 and 1757, made the Composition of one Shilling *per* Man, for the whole six Days, highly advantageous to the People, as every Man's Labour must have yielded him more than Two-pence *per* Day. Accordingly, the Certification of Non-payment of the Composition, was the Exaction of the Statute-work, and that the People thought it a great Ease to pay that Composition, is proved by this Circumstance, that after all Mr. *Walker's* Industry to raise an Opposition, he and his own Servant were the only two able Persons in the District who refused to pay. Indeed, that he, of all Men, had the least Reason to complain of exacting the Composition, appears from his having formerly brought a Suspension, on account of his being refused the Benefit of a larger Composition.

Holding it then to have been a legal, as well as a beneficial Act of the Justices, to levy a small Composition, in place of the Statute-work, it follows, that the Poinding was most just. Your Lordships have heard, that Intimation was made on the 29th of *May*, for the People to pay before the 15th of *June*. It was certified, and is admitted, that the Pursuers neither paid nor offered to work within the Time limited, when such Work unquestionably might have been exacted. The Defenders do therefore humbly apprehend, that the Pursuers did thereby subject themselves to Execution, for the Penalty imposed by Law on Deficients. The subsequent Advertisement issued by Mr. *Burns*, calling out the Deficients to work upon the 15th, 16th, and 17th Days of *August*, was made *ex super abundanti*. But when both are taken together, and it is considered, that the Pursuers would neither pay nor work, and that Mr. *Walker's* Deficiency the preceeding Year, confessedly exposed him to be poinded to the very same Extent, it is hoped your Lordships will be of Opinion, the Defenders acted agreeable to Law, in granting the Warrant, on Application of the proper Officer.

It shall only be farther observed, that the Justices and Commissioners had, in the Beginning of the Season, engaged the Soldiers, and other Labourers, to repair the Road, and had actually advanced Part of their Pay, and become bound for the Residue, long before the End of *June*. It was incumbent, therefore, on those who did not incline to pay, but to work, to have signified their Resolution to the Overseer in due Time; and as the Pursuers did not think fit to do so, it was highly just that they should be afterwards obliged to pay their Proportion, for Discharge of the Expences incurred: Nor was there any particular Design to distress Mr. *Walker*. The Warrant was directed in general, against him and about 100 more, although he and *Herd* only were poinded, as all the others, who were able, prevented Execution by Payment.

So much being humbly submitted, in Defence of the Poinding, the Defenders must notice some Averments in Fact, made by the Pursuer.

It has been said for Mr. *Walker*, that he was actually employed in his Harvest, on the Days when he was called out to work; but according to the Defenders Information, he only caused his Servants cut down some unripe Barley, to afford him a Pretext for this Plea. There was then no Harvest in the Country, and upon the Footing of the above Argument, the Poinding was legal, without respect to the Time of his being so called out.

Mr. *Walker* also claims a personal Exemption from the Statute-work, on account of his being an Overseer of Part of the Road from the Bridge of *Urie* to *Stonehaven*; but although it is true he was named an Overseer on that Road in *May 1755*, yet since that Time he has never acted in that Capacity, nor till now ever claimed such an Exemption. It is not the Practice to give that Privilege to Overseers, for, on the contrary, *Alexander Copland*, *William Wise*, *James Leith*, *William Leslie*, and others in the same District, who have given great Attendance

dance as Overseers, never pretended to, nor were permitted such an Exemption.

Another Circumstance, on which Mr. *Walker* has assumed great Merit, is as easily obviated. He says, that he has made 700 Yards of a high Road at his own Expence; but the Fact is, that there is a Foot-path that strikes out of the Post-road, a little to the South of the *Cairn of Muchles*, and passes by *Ury* and *Acquibirrie*, towards *Drumlithie*. This Foot-path is not above a Mile shorter than that by *Stonehaven*, and is in many Places void of any Track or Vestige of a Road. It is in the Winter Season altogether obstructed by the Water of *Cowie*, the Bridge being on the *Stonehaven* Road, and it is never used but by Drivers of Cattle and Carriers, when they have the Charge of smuggled Goods. On this notable Road, Mr. *Walker* has indeed made some Repair, within his own Possession, for his private Convenience, and to prevent his Grounds being potched by a Variety of different Roads. But this Repair can never have any Impression on the present Question.

And in Behalf of the other Pursuer, *Peter Herd*, it is alleged, that he came to reside in the Parish of *Dunnottar*, only at *Whitsunday* 1757, and had performed the Statute-work for the Spring half Year, in the Parish of *Glenbervie*. Of this Allegation, the Pursuers have declined to bring any Evidence, and the Defenders deny the Truth of it. Had it been true, Mr. *Herd* ought to have applied, and would have obtained his Exemption; and as he did not, the Presumption is against him, and is fortified by this Circumstance, that the Orders for the Spring Work, are never given earlier than the General Meeting in *May*.

And now, in the *third and last Place*, supposing the Poinding had been irregular, the Defenders humbly apprehend, they nevertheless cannot be subjected in Damages. They will not repeat Circumstances already stated, which must have great Weight on this Point. There is a wide Difference between

tween such Actings as void a Poinding, so as to entitle the Party to Restitution of the Goods, and those, that besides Restitution, subject the Poinders to Damages and Expences. The least Inaccuracy in Form, may produce the first Effect, but there must be a *mala fides* to occasion the latter. The Defenders acted *optima fide*, for the publick Good, and with an Apprehension of Law, founded on the universal Practice of the Country. Should that Apprehension be now found wrong, it could not justly operate *retro*, so as to punish them, as if they had acted contrary to known and certain Law.

If any Wrong was done, the Officer only who applied for the Warrant, is accountable for it. The Defenders signed the Order, in the Capacity of Judges, specially empowered by Statute, and not as Parties, and therefore, the Officer who obtained the Warrant, like a Creditor who obtains undue Diligence from your Lordships, ought only to be answerable for it. In the Character of Justices and Commissioners, the Defenders have acted without Fee or Reward, and are under no Obligation to take extraordinary Trouble in a Matter of publick Police, other than what every good Citizen owes to the Community. They hope, therefore, on the whole, that your Lordships will find the Poinding was legal and regular, and at any rate, that they cannot be liable in Damages to the Pursuers.

In respect whereof, &c.

DAV. RAE.

